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No. 95-156

In The

# Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

RICHARD LEE MUSCHIK,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 also governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b), where the Sentencing Guideline provision is based on the use of the terms "mixture or substance" found in 21 U.S.C. § 841(b) and there is an absence of legislative history or congressional intent to suggest that different weights for the same dosage unit of LSD should be used for Sentencing Guideline purposes than for mandatory minimum considerations under the statute.

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UNITED STATES OF AMERICA,

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RICHARD LEE MUSCHIK,

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

A three judge panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment of sentence which imposed a 20-year mandatory minimum sentence on Respondent Richard Lee Muschik. Petitioner United States moved for a rehearing *en banc* which motion was denied. Thereafter, the United States filed a Petition for Writ of Certiorari to the Supreme Court for review of the Ninth Circuit decision.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 49 F.3d 512. Denial of the United States' petition for hearing with suggestion for rehearing was entered May 1, 1995. (App., *infra*, 20a)

## STATEMENT OF JURISDICTION

This petition is not properly before the Court as represented by Petitioner United States. Pursuant to Rule 13.1 of the Supreme Court Rules, a petition for a writ of certiorari to review a civil or criminal judgment entered by a United States Court of Appeals is deemed to be timely filed if filed within 90 days after entry of judgment. If a petition for rehearing is timely filed in the lower court, the petition runs from the date of the denial of the petition for hearing. Supreme Court Rule 13.4. However, "a suggestion made to a United States Court of Appeals for a rehearing *en banc* pursuant to Rule 35(b), F.R.A.P. is not a petition for rehearing within the meaning of this [Rule 13.4] Rule." Supreme Court Rule 13.4. Here, Petitioner United States filed its petition for writ of certiorari outside the time allowed by Rules 13.1 and 13.4. The Ninth Circuit Court of Appeals issued its judgment in this matter on February 28, 1995. App. 1a. The United States filed its petition for rehearing with suggestion for rehearing *en banc* on April 11, 1995. App. 16a-19a. The Ninth Circuit denied the United States petition May 12, 1995. App. 20a.

While the United States' petition for writ of certiorari to this Court would be timely filed if the United States had petitioned the Court of Appeals for a rehearing, that is not the case. Rather, the United States petitioned the Ninth Circuit for a rehearing *with suggestion for rehearing en banc pursuant to Rule 35(b),* F.R.A.P. instead of Rule 40. App. 16a-17a. (emphasis added.) Therefore, the United States failed to toll the time for filing its

petition for writ of certiorari with this Court under Rule 13.4 and the time to file the writ expired 90 days from February 28, 1995 which is May 29, 1995.

## STATEMENT OF THE CASE

The Drug Enforcement Agency arrested Respondent Richard Muschik on May 24, 1991 pursuant to a complaint charging him with conspiracy to possess with intent to distribute and actual distribution of LSD in violation of 21 U.S.C. § 841(a)(1) and § 846 (App. 5a).

Respondent ultimately plead guilty to Count I of a five count indictment charging conspiracy to distribute LSD pursuant to 21 U.S.C. § 846. *Id.* The District Court sentenced Respondent on May 26, 1992 to a term of twenty years imprisonment after determining that Respondent's prior state conviction for a drug related charge, together with the amount of LSD involved which the presentence report calculated as 101 grams, required application of the mandatory minimum provisions of 21 U.S.C. § 841(b)(1)(A). *Id.* Respondent timely appealed to the Ninth Circuit the convictions and sentence.

The Ninth Circuit affirmed the convictions against the Respondent for conspiracy to distribute LSD in violation of 21 U.S.C. §§ 846 and 841(a)(1), but vacated in its entirety the District Court's sentence and remanded the case for resentencing in strict compliance with 21 U.S.C. § 851(b) inquire and inform provisions. *United States v. Muschik*, No. 92-30233 (9th Cir. June 11, 1993).

Prior to the District Court's resentencing hearing pursuant to the Ninth Circuit remand, the United States Sentencing Commission amended the Sentencing Guidelines to correct the way in which sentences involving LSD were calculated. *United*

*States Sentencing Guidelines Manual, App. C, Amendment 488* (1993). The new amendments to the Guidelines rejected the former process of including the entire weight of the carrier medium in determining the weight of LSD and instead assigned a weight of 0.4 milligrams per dosage unit of LSD. *Id.* § 2D1.1(c). Under the prior method of calculation, it was determined that Respondent Muschik possessed 101 grams of LSD because the entire weight of the blotter paper was included. *Id.*

Respondent argued that the amended Sentencing Guideline revisions should apply and on October 22, 1993, the District Court agreed to consider the revisions and ordered a new presentence report prepared which recalculated the weight of the LSD under the amended Guidelines as 5.68 grams rather than 101 grams. *Id.*

On November 23, 1993, the court held the sentencing hearing and resentenced Respondent to exactly the same sentence that the District Court previously had entered on May 26, 1992, and did so with the recognition that such a sentence was overly harsh but that the court was without an option in light of the ruling in *Chapman v. United States*, 500 U.S. 453 (1991). App. 23a. The sentence entered by the District Court on May 26, 1992, and again on November 5, 1993, commits the forty-four year old Respondent Richard Lee Muschik to prison for a period of 20 years pursuant to the mandatory minimum provisions of 21 U.S.C. § 841(b)(1)(A). Thereafter, Respondent timely appealed the District Court's sentence.

The Ninth Circuit reversed again the District Court's Judgment of Sentence and found that at the time *Chapman* was decided, neither the Sentencing Guidelines nor § 841(b)(1) defined the words "mixture" or "substance." *United States v. Muschik.* App. 8a. Importantly, the Ninth Circuit observed that at the time *Chapman* was decided, this Court was presented with

only two choices, utilizing the negligible weight of the pure LSD, or utilizing the gross weight of the pure LSD, together with its carrier medium. The Ninth Circuit found that faced with these two choices, this Court could only choose the gross weight in keeping with the market orientated approach adopted by Congress and the Guidelines. *Id.* at 9a. The Ninth Circuit found that Amendment 488 (now § 2D1.1(c)) of the United States Sentencing Guidelines presents a third option, namely, the court may utilize and assign a rational weight of LSD for the calculation of sentences. *Id.* The Ninth Circuit found that this third option did not disturb or conflict with the holding of *Chapman* but was consistent with *Chapman's* holding "to include the weight of the carrier medium for the sentencing purposes since that medium facilitates the transportation, storage, concealment, and sale of the drug." *Id.* The Ninth Circuit further held that "[T]he frame work of *Chapman* thus remains intact while the theoretical foundation upon which it sits is strengthened" by using the Sentencing Guidelines method of assigning a rationale weight to a dosage unit of LSD. *Id.* at 11a.

The Ninth Circuit also found that the newly adopted Amendment No. 488 left intact one of the fundamental rationales behind *Chapman, i.e.*, the maintenance of a "market oriented" approach to drug sentencing. *Id.* at 11a. By utilizing the rational method set forth in § 2D1.1(c) of the Guidelines, Muschik's sentence would still be based on the number of dosages sold rather than the type of medium that happens to be involved. The Ninth Circuit held that it is a rational and fair system to assign some weight to the carrier medium unlike the Petitioner in *Chapman* who sought to assign no weight to the carrier medium. In *Muschik,* the Court of Appeals found that assignment of a weight 8 times higher than the pure drug sufficiently recognizes and punishes retail drug traffickers. *Id.* at 10a.

The Ninth Circuit also found that its holding was consistent

with the Sentencing Commission's intent to correct the pre-amendment situation where LSD sentences were significantly disproportionate to sentences imposed for other more dangerous substances. *Id.* Finally, the Court of Appeals also observed that while Congress had the opportunity to challenge the refinement and revision of punishment for drug offenses involving LSD based upon the weight of the actual LSD together with some weight of the carrier medium, Congress chose to remain silent on Amendment 488 making it incorrect to assume that Congress had made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and guideline sentencing when such decisions can be readily harmonized. *Id.* at 13a.

## REASONS FOR DENYING THE WRIT

The United States has failed to file timely its petition for writ of certiorari to this Court and the petition should therefore be denied. Even assuming the petition is timely, the United States Court of Appeals for the Ninth Circuit has correctly decided the issue of whether to use different drug weights for the same dosage units of LSD. The Court's decision is *Muschik* provides for a rational, fair, and uniform sentencing system that is consistent with the Supreme Court's holding in *Chapman.*

The Petitioner United States only apparent reason for requesting the petition is that the government disagrees with the decision in *United States v. Muschik,* which is contrary to the Seventh Circuit holding in *Neal v. United States, cert. granted,* No. 94-9088 (June 19, 1995). While a conflict within the Circuits is a basis for granting the government's petition for certiorari, it need not be the controlling factor in the exercise of the Court's decision. Rule 10, Supreme Court Rules. Even assuming this Court desires to resolve such a conflict, the Court can do so by summarily denying the United States' petition in this case and deciding *Neal v. United States* in accordance with the denial of certiorari for this matter.

If the Court determines that the United States petition for certiorari should be granted, notwithstanding the untimely filing of the petition, then the Court should grant only in part the United States petition. The United States has requested that the Court hold the petition in this case and dispose of it in light of the decision in *Neal* rather than allowing Muschik the opportunity to brief and argue his case. Brief for Petitioner at p. 8. Petitioner desires to have the Court review the question presented by *Muschik* and *Neal* based upon the Circuit decision most favorable to the United States' position against an apparently *pro se* defendant.

In addition the case in *Neal v. United States* is different from *United States v. Muschik*. In *Neal*, the defendant received at least some benefit in a reduced sentence because the Sentencing Guidelines amendment reduced the amount of weight of LSD. *Neal* was originally sentenced to 192 months of imprisonment. After his pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines, the District Court reduced his sentence from 192 months to 120 months. In *Muschik*, however, Respondent Muschik received no benefit from the intervening amendment, even though the gross weight of LSD was 101 grams under the prior Guidelines and 5.68 grams under the revised Guidelines. Muschik received a sentence of 240 months the exact sentence he had received prior to the amendment to the Sentencing Guidelines. Presumably, the United States will argue that applying two different weights for the same drug is not irrational or unfair because *Neal* received at least some benefit from this dual system, unlike Respondent Muschik. In the event that the petition is granted in *United States v. Muschik*, the Court should join *Muschik* and *Neal* to consider them concurrently, thereby providing all parties an opportunity to argue their respective positions to this Court.

## CONCLUSION

The petition for writ of certiorari should be denied and in the event it is granted, the United States petition should be modified to allow the Court to consider *United States v. Muschik* and *Neal v. United States* together rather than holding the petition in *Muschik* pending a decision in *Neal.*

Dated: October, 19, 1995

Respectfully submitted,

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# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 28, 1995

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-30461

D. C. No. CR 91-00072-CCL

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

RICHARD LEE MUSCSK,

*Defendant-Appellant.*

## OPINION

Appeal from the United States District Court for the District of Montana

Charles C. Lovell, District Judge, Presiding

Argued and Submitted
October 3, 1994 — Seattle, Washington

Filed February 28, 1995

*Appendix A*

Before: Harlington Wood, Jr.,* Procter Hug, Jr., and Thomas Tang, Circuit Judges.

Opinion by Judge Wood

* * *

## COUNSEL

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Kris A. McLean, Assistant United States Attorney, Helena, Montana, for the plaintiff-appellee.

## OPINION

WOOD, Jr., Circuit Judge:

Following the Ninth Circuit's remand, Richard Lee Muschik was resentenced on December 6, 1993, to a prison term of twenty years pursuant to the mandatory minimum sentence set forth in 21 U.S.C. § 841(b)(1)(A). Muschik had been earlier found guilty of escape in violation of 18 U.S.C. § 751 and pleaded guilty to conspiracy to distribute lysergic acid diethylamide ("LSD") in violation of 21 U.S.C. §§ 841(a)(1) and 84[illegible]. In his appeal, Muschik argues that the district court erroneously concluded that ten grams or more of LSD were involved in this case. Muschik contends that the entire weight of the carrier medium should not be included when the weight of LSD is calculated. Instead,

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* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, is presiding by designation

*Appendix A*

Muschik argues that the formula set forth in the November 1, 1993 amendment to U.S.S.G. § 2D1.1(c) should be used to determine the net weight of LSD involved for sentencing purposes. For the reasons given below, we vacate the sentence imposed by the district court and remand for resentencing in accordance with this opinion.

## I.

## BACKGROUND

Richard Lee Muschik was arrested on May 24, 1991, by the Drug Enforcement Administration ("DEA") pursuant to a Complaint charging him with conspiracy to possess with intent to distribute and actual distribution of LSD in violation of 21 U.S.C. §§ 841(a)(1) and 846. On October 23, 1991, Muschik escaped from federal custody while awaiting trial on the drug charges. Muschik was apprehended again on November 28, 1991, and detained. On January 28, 1992, Muschik was convicted of escape in violation of 18 U.S.C. § 751.

On March 12, 1992, Muschik pleaded guilty to conspiracy to distribute LSD in violation of 18 U.S.C. §§ 841(a)(1) and 846. On May 26, 1992, the district court combined the escape and drug charges for sentencing and then determined that the amount of LSD involved required application of the mandatory minimum provision of 21 U.S.C. § 841(b)(1)(A). Pursuant to this statute, and in light of Muschik's prior state felony drug conviction, Muschik was sentenced to a term of twenty years.

Muschik appealed these convictions and the sentence. We affirmed the escape and drug convictions, but vacated the district court's sentence and remanded for resentencing in strict

compliance with the inquire and inform provisions of 21 U.S.C. § 851(b) regarding the enhancement of Muschik's sentence for recidivism. *United States v. Muschik*, No. 92-30233 (June 11, 1993).

Prior to the district court's resentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines and changed the manner in which the weight of LSD is calculated for sentencing purposes. U.S.S.G. § 2D1.1(c) (1993) (as amended by U.S.S.G. app. C, amend. 488 (1993)) ("Amendment 488"). Under the prior method, which includes the entire weight of the carrier medium, it was determined that Muschik possessed 101 grams of LSD. In preparation for resentencing, the United States Probation Office recalculated the weight of this LSD under the amended guidelines, which establish a standard weight of 0.4 milligram per dosage of LSD, and arrived at a weight of 5.68 grams.

On December 6, 1993, the district court nevertheless resentenced Muschik to a term of twenty years a term of the same length as it had imposed originally. Muschik appeals.

## II.

## ANALYSIS

We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Conkins*, 987 F.2d 564, 571 (9th Cir. 1993). The district court's other legal determinations in this regard are also reviewed *de novo*. *United States v. Anderson*, 895 F.2d 641, 644 (9th Cir. 1990). To the extent that the district court has made any factual determinations, the clearly erroneous standard applies. *Id.*

*Appendix A*

A.

Title 21 U.S.C. § 841(b)(1)(A)(v) imposes a mandatory minimum sentence of ten years imprisonment for a violation of § 841(a)[1] where there is involved "10 grams or more of a mixture or substance containing a detectable amount" of LSD. Section 841(b)(1)(B)(v) imposes a mandatory minimum sentence of five years imprisonment where there is involved "1 gram or more of a mixture or substance containing a detectable amount of LSD. Both sections provide for a doubling of the mandatory minimum sentence where the defendant has one or more prior felony drug convictions. Thus, it is obvious that properly determining the weight of LSD involved in a given case is of paramount importance for sentencing purposes.

The calculation of LSD weight is difficult, however, because the quantity of the actual drug present in each dose is infinitesimal — the DEA assigns a standard weight for LSD of only 0.05 milligram per dosage unit. To facilitate transportation,

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1. In relevant part, § 841(a) provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

Muschik actually pleaded guilty lo conspiracy to distribute LSD in violation of 21 U.S.C. § 846, but that section states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

distribution and use of LSD, it is commonly dissolved in solvent and then spread upon a medium — usually blotter paper, gelatin, or a sugar cube. This inactive carrier medium typically far outweighs the LSD itself; thus, there exists the potential for wide variances in sentencing based upon nothing more than the happenstance weight of the particular carrier chosen by a given defendant.

In *Chapman v. United States*, 500 U.S. 453, 468 (1991), the Supreme Court held that the term "mixture or substance" present in 21 U.S.C. § 841(b)(1) includes the entire weight of the carrier medium.[2] The district court relied upon *Chapman* to calculate the weight of LSD involved in this case. With the entire weight of the carrier medium thus included, the amount of LSD involved was determined to be 101 grams well over the ten gram benchmark required for the imposition of the ten year mandatory minimum sentence established by 21 U.S.C. § 841(b)(1)(A). In light of Muschik's prior state felony drug conviction, the district court followed § 841(b)(1)(A) and doubled the mandatory minimum sentence to twenty years.

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2. The *Chapman* Court answered concerns of possible unfairness that may result where variations in the weight of the inert carrier medium cause otherwise similarly situated defendants to receive different sentences by stating:

> Although LSD is not sold by weight, but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool.

*Chapman*, 500 U.S. at 466.

*Appendix A*

B.

Muschik does not contest the holding of *Chapman* directly, but instead contends that the November 1, 1993 amendment to § 2D1.1(c) of the Sentencing Guidelines compels a recalculation of the weight of the LSD as the amendment postdates both the *Chapman* decision and the Ninth Circuit's remand for resentencing. Since there is no *ex post facto* clause problem involved here, as Muschik is certainly not disadvantaged by the amendment, the Guidelines that are in effect upon Muschik's resentencing must be applied. *United States v. Fagan*, 996 F.2d 1009, 1018 (9th Cir. 1993). The question presented here concerns the actual nature of the changes wrought by the amendment to § 2D1.1(c) and the relation of that amendment to *Chapman* and the mandatory minimum statutes.

III.

We begin by noting that this precise issue has already been addressed, with differing results, by several other circuits. We find the reasoning of the Eighth Circuit as expressed in *United States v. Stoneking*, 34 F.3d 651 (1994), a late case not cited to us by the parties, persuasive and herein adopt it for our own.[3] Nor did the district court have the benefit of this late case. We reject the contrary result reached by the Seventh, Fifth, Tenth and First Circuits. *See United States v. Neal*, No. 94-1773 (7th Cir. Feb. 2, 1995) (en banc); *United States v. Pardue*, 36 F.3d 429 (5th Cir. 1994); *United States v. Mueller*, 27 F.3d 494 (10th Cir. 1994); *United States v. Boor*, 25 F.3d 52 (1st Cir. 1994).

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3. The Eighth Circuit subsequently vacated the *Stoneking* opinion and granted an *en banc* rehearing. As of the date of our decision in this case, the *en banc Stoneking* opinion has not yet been issued. Regardless of the Eighth Circuit's eventual decision in this case, we remain impressed by the reasoning expressed in the original opinion.

*Appendix A*

A.

As an initial matter, it is clear that where a statute and a Guideline conflict, the statute controls.[4] Therefore, to grant full effect to Amendment 488, we must find that the amendment does not conflict with the mandatory minimum provisions at issue here. Our review of the amendment, the relevant provisions of the statute, and the policy considerations behind each leads us to conclude that Amendment 488 and the statute do not conflict.

As discussed above, the Supreme Court in *Chapman* held that the term" mixture or substance" found in 21 U.S.C. § 841(b)(1) "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." *Chapman*, 500 U.S. at 468. At the time *Chapman* was decided, however, neither the Sentencing Guidelines nor § 841(b)(1) defined the words "mixture" or "substance." Therefore, the Supreme Court utilized dictionary-supplied definitions.[5] The Supreme Court determined

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4. *See, e.g.*, U.S.S.G. § 5G1.1(b) (1993) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

5. The Supreme Court found:

> A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." . . . A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the panicles of the other.

*Id.* at 462 (citations omitted).

that blotter paper fell within its definition of "mixture or substance" because "[t]he LSD crystals are inside of the paper; so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence . . . The LSD is diffused among the fibers of the paper." *Id.* at 462.

One important factor behind the *Chapman* decision was that the Supreme Court was there presented with only two choices: utilize the negligible net weight of the pure LSD or utilize the gross weight of the pure LSD together with its carrier medium. "Faced with that choice, the Court could only choose the gross weight, in keeping with the fact that the weights of other drugs include dilutants and cutting agents, and in keeping with the market-oriented approach adopted by the Guidelines." *Stoneking*, 34 F.3d at 654; *see also Neal*, No. 961773, slip op. at 21-22 (Ripple, J., dissenting). The advent of Amendment 488 presents a third option: A court may now utilize an assigned rational weight for the calculation of sentences.

It is our belief that the assignment of a uniform and rational weight to LSD on a carrier medium does not conflict with *Chapman*. In fact, the background commentary to § 2D1.1, as amended by Amendment 488, expressly states that "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence *(see Chapman;* § 5G1.1(b))." Rather than "overriding" *Chapman's* interpretation of "mixture or substance," the formula set forth in Amendment 488 merely standardizes the amount of carrier medium that can be properly viewed as "mixed" with the pure drug.

*Chapman* held that it was rational to include the weight of

the carrier medium for sentencing purposes since that medium facilitates the transportation, storage, concealment, and sale of the drug. *Chapman*, 500 U.S. at 466. Amendment 488 accounts for this facilitation by selecting a standard dosage weight eight times the actual weight of the pure LSD[6] which simultaneously eliminates the potential for undue sentencing disparities,[7] the existence of which even the *Chapman* Court acknowledged. *See Chapman*, 500 U.S. at 466. As the Eighth Circuit found,

> [b]y assigning a sentencing weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined in effect, that .05 mg of LSD can be absorbed in, or chemically bonded with, a

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6. The background commentary to U.S.S.G. § 2D1.1, as amended by Amendment 488, makes clear the Sentencing Commission's intent to perpetuate the rationale behind *Chapman:*

> The dosage weight of LSD selected exceeds the [DEA]'s standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes . . . the decision in *Chapman v. United States*, [500 U.S. 453] (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed).

7. For example, before Amendment 488 took effect, a drug trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD under 21 U.S.C. § 841(b)(1)(B) by selling either 1/2 of a sugar cube dose, 72 blotter paper doses, or 445 gelatin capsule doses. *See Chapman*, 500 U.S. at 458 n.2.

> carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug.

*Stoneking*, 34 F.3d at 654 (footnote omitted). The framework of *Chapman* thus remains intact while the theoretical foundation upon which it sits is strengthened.

B.

Amendment 488 also leaves intact another concern behind the *Chapman* decision, the maintenance of a "market-oriented" approach to drug sentencing. This approach looks to "the total quantity of what is distributed, rather than the amount of pure drug involved . . . to determine the length of the sentence." *Chapman*, 500 U.S. at 461 (citation omitted). Standardizing the weight value of LSD furthers this market-oriented approach because LSD, unlike most other drugs, is not sold by weight but by dose. The price of a dose of LSD is set without any regard to the weight of carrier medium. Amendment 488 thus furthers the market-oriented approach by hinging sentencing upon the number of doses sold, rather than upon the type of medium that happens to be involved. By setting a weight figure eight times higher than the pure drug, the amendment remains true to *Chapman* by sufficiently recognizing retail realities and adequately punishing retail traffickers.

C.

The Sentencing Commission also intended for Amendment 488 to correct the pre-amendment situation wherein LSD

sentences were disproportionate to those sentences imposed for other, more dangerous substances, such as phencyclidine ("PCP").

> [T]he weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances . . .

U.S.S.G. § 2D1.1, comment. (backg'd) (1993) (as amended by Amendment 488).

## IV.

After Amendment 488 was sent to Congress for review, it took effect without modification or delay, and thus with congressional approval, on November 1, 1993. Such a refinement of the sentencing scheme through the action of the Commission, with the knowledge and consent of Congress, is an expected and necessary element of the process contemplated by the present sentencing system. As the Supreme Court has noted, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the

Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might Suggest" *Braxton v. United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. § 994(o)). The Commission performed its congressionally delegated role by amending § 2D1.1 in light of *Chapman*. Congress did not challenge the revision. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized. "The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice." *Neal*, 94-1773, slip. op. at 13 (Ripple, J., dissenting).

Those Circuits which reached the opposite result on this issue did so, in our view, after misinterpreting the statement in the amended background commentary that "[n]onetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *See, e.g., Neal*, No. 94-1773, slip op. at 7; *Pardue*, 36 F.3d at 431; *Boot*, 25 F.3d at 55. As we have endeavored to demonstrate, there is much more to Amendment 488 than this single sentence. Read as a whole, the amended background commentary demonstrates the intent of the Sentencing Commission to lessen the "undue influence" that different carrier weights have on the offense level and to harmonize offense levels for different controlled substances while taking into account *Chapman's* interpretation of the term "mixture or substance."

The Commission intended to leave *Chapman* intact —

through the amendment, the Commission merely intended to standardize the amount of carrier medium that can viewed as "mixed" with LSD. As discussed in the amended background commentary, the Commission selected a weight value eight times the actual weight of the pure LSD in an express effort to recognize the impact of *Chapman* on weight calculation. The conclusion reached by the other Circuits results in a dual system of calculating LSD weight —one rule for calculations under the Sentencing Guidelines and another rule for the mandatory minimum statutes. We decline to find that the Commission, whose mission it is to promote uniformity and fairness in sentencing, effectuated such a nonuniform and unfair result.

V.

By giving effect to Amendment 488 as written, we advance the basic objectives Congress sought to achieve in providing for the development of the Sentencing Guidelines, namely the creation of an effective, fair, and uniform sentencing system. The United States Probation Office recalculated the weight of Muschik's LSD utilizing the standard set forth in the amendment and arrived at a total of 5.68 grams. As this revised figure is more than one gram but less than ten grams, Muschik's mandatory minimum sentence will drop to ten years under 21 U.S.C. § 841(b)(1)(B) when coupled with Muschik's prior state felony drug conviction.

We have also considered the other arguments advanced by appellant and found them to be without merit.

## VI.

## CONCLUSION

For the reasons set forth above, we VACATE the sentence imposed by the district court and REMAND for resentencing in accordance with this opinion.

## APPENDIX B — EXCERPTS OF PETITION FOR REHEARING DATED APRIL 11, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-30461

UNITED STATES OF AMERICA

Appellee,

v.

RICHARD LEE MUSCHIK

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GOVERNMENT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

STATEMENT OF COUNSEL

Pursuant to Fed. R. App. P. 35 and Rule 35-1 of the Rules of this Court, the United States suggests the appropriateness of rehearing en banc of the panel's decision that vacated appellant's sentence. The opinion, written by Judge Harlington Wood, Jr., of the Seventh Circuit, sitting by designation, and joined by Judges Hug and Tang, was rendered on February 28, 1995.

The panel held that the weight assigned by the Sentencing Commission to a dosage unit of lysergic acid diethylamide (LSD) for purposes of calculating a defendant's sentence under Sentencing Guidelines § 2D1.1 also governs the determination of

the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

The panel's opinion directly conflicts with the opinions of five other courts of appeals. Moreover, the issue in this case involves a sentencing rule of national application for which there is an overriding need for national uniformity. Accordingly, rehearing en banc of the panel's decision is appropriate under Fed. R. App. P. 35 and this Court's Rule 35-1.

## ISSUE PRESENTED

Whether the panel's holding that the standard weight assigned to a dosage unit of LSD under Sentencing Guidelines § 2D1.1 must also be used to determine a defendant's eligibility for a mandatory minimum sentence under 21 U.S.C. 341(b) is contrary to *Chapman v. United States*, 500 U.S. 453 (1991), which held that the actual combined weight of the LSD and its carrier medium determine whether a defendant is subject to a mandatory minimum sentence under the statute.

## STATEMENT

1. *The District Court Proceedings.* On March 12, 1992, defendant pleaded guilty to conspiracy to distribute LSD, in violation of 21 U.S.C. 841(a) and 846. At sentencing, the district court determined that the combined weight of the 14,200 dosage units of LSD and the blotter paper was 101 grams. Since defendant had a prior felony drug conviction, the district court sentenced defendant to the mandatory minimum 20-year sentence under 21 U.S.C. 841(b)(1)(A)(v).[1] This Court affirmed

1. When a drug offense involves "10 grams or more of a mixture or substance (Cont'd)

defendant's conviction, but * * * have agreed that the Supreme Court's interpretation of the statute in *Chapman*, rather than the standard dosage weight assigned to LSD in amended Guidelines § 2D1.1(c), controls the determination of the weight of LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

## CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, and the suggestion for rehearing en banc should be accepted.

Respectfully submitted.

SHERRY SCHEEL MATTEUCCI
United States Attorney
*District of Montana*

KRIS A. McLEAN
*Assistant U.S. Attorney*
*District of Montana*

JOSEPH C. WYDERKO
*Attorney*
*Department of Justice*
*Washington, D.C.*

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(Cont'd)
containing a detectable amount" of LSD, 21 U.S.C. 841(b)(1)(A)(v) provides a mandatory minimum sentence of ten years' imprisonment. If a defendant also has a prior conviction for a felony drug offense, Section 841(b)(1)(v) provides a mandatory minimum sentence of 20 years' imprisonment.

*Appendix B*

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Government's Petition for Rehearing with Suggestion For Rehearing En Banc were served this *11th* day of April, 1995, by first-class mail, postage prepaid, upon the following counsel for appellant:

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s/ Joseph C. Wyderko
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## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 1, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 93-30461
D.L. No. CR-91-00072-CCL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v

RICHARD LEE MUSCHIK,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana

Before: WOOD[1], HUG, AND TANG, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellee's petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, and Judges Wood and Tang have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and

1. Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

## APPENDIX D — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 2, 1993

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**HELENA DIVISION**

Criminal Docket No.

No. 91-40-M-CCL; No. 91-72-M-CCL

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

RICHARD LEE MUSCHIK, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

Taken at:
UNITED STATES COURTHOUSE
301 SOUTH PARK
HELENA, MONTANA 59601
DECEMBER 2, 1993

[18]

* * * * *

THE COURT: Very well.

*Appendix D*

Mr. Muschik, do you have anything further that you would like to say?

THE DEFENDANT: No, your Honor.

THE COURT: Are you ready for the Court to impose sentence?

THE DEFENDANT: Yes, I am.

THE COURT: And Mr. Brooke, is there any reason, legal or otherwise, why sentence ought not be imposed?

MR. BROOKE: No, your Honor.

THE COURT: The issue before the Court at this point is simply, it seemed to me whether this Court is obligated to follow the ruling of the United States Supreme Court in the Chapman case and whether the Court is obligated to enforce what Congress has enacted as a mandatory minimum sentence. And I think the answer to that is that it's the duty of the Court to follow those authorities in this case, under these particular facts.

I stated before that I think the sentence imposed was a little bit longer sentence of incarceration than this Court would have imposed without the mandatory minimum. [19] And that remains the case today. But I think the Court is compelled to follow the authority that Congress has laid down and that the Supreme Court of the United States has laid down.

And accordingly, it's the judgment of the Court that the defendant is hereby remanded to the custody of the Attorney General for a term of 20 years. And upon release from

**imprisonment, the defendant will be placed on supervised release for a term of ten years.**

* * * * *